No. 85765

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

MICHAEL CRAWFORD,

Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Steven H. Goldman, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for first degree murder, §565.020, RSMo 2000[1]; first degree assault, §565.050; and two counts of armed criminal action, §571.015, obtained in the Circuit Court of St. Louis County, for which appellant was sentenced to life imprisonment without parole and three consecutive thirty year sentences. This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On January 27, 2004, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

[1]All statutory citations are to RSMo 2000 unless otherwise noted.

STATEMENT OF FACTS

Appellant, Michael Crawford, was charged by indictment with first degree murder, first degree assault, and two counts of armed criminal action (LF 1, 11-13). An information in lieu of indictment was subsequently filed, charging appellant as a persistent offender (LF 16-17). On September 23, 2002, this cause went to trial before a jury in the Circuit Court of St. Louis County, the Honorable Steven H. Goldman presiding (LF 4; Tr. 110).

Appellant does not challenge the sufficiency of the evidence to support his conviction. Viewed in the light most favorable the verdict, the evidence adduced at trial showed the following: Early in the afternoon of October 23, 2000, Tamika Beverly loaned her 1999 teal-green Pontiac Grand Am to her boyfriend, Robert Reece (Tr. 562-563).

Later that same afternoon, 12-year-old Harold Anderson was outside an auto parts store at the intersection of Jennings and Lewis & Clark Boulevard in North St. Louis County (Tr. 346). With him were two adults, Roland Moore and Dion Butler (Tr. 347-348). They were buying a battery for Butler's truck (Tr. 348). At that same time, Beverly Williams was in her car at the intersection of Lewis & Clark and Jennings Station Road (Tr. 384). Williams saw Anderson, Moore, and Butler -working on their vehicle in the lot of the auto parts store (Tr. 386).

As Butler and Moore were putting the new battery into Butler's truck, a green Grand Am pulled up and went to the other side of the auto parts store, parking on the far side of the lot (Tr. 350). Two black men were in the car (Tr. 350-351). The passenger in the car got out of the car, walked on the sidewalk toward the front of the store, passing the truck (Tr. 351). After he passed the truck, the passenger, later identified as appellant, raised up his shirt and pulled out a gun (Tr. 352). Anderson said, "This man got a gun." (Tr. 352). Moore and Butler did not hear him, and Anderson repeated, "This man got a gun." (Tr. 352). Anderson, Moore, and

Butler ran (Tr. 352). Moore tripped over the curb and fell; Butler ran across the street (Tr. 352-353).

Williams, in her car at the intersection, heard gunshots from the auto parts store parking lot and turned and saw Anderson and one man running on the left side of their truck, and two other men running on the right side of the truck (Tr. 386). Appellant shot Morgan by the street in front of the parking lot of the auto parts store (Tr. 354, 387). Appellant then went after Butler and shot him down in front of a driveway across the street from the auto parts store (Tr. 354, 387-388). Butler was a suspect in the killing of appellant's brother (Tr. 607-608).

Appellant then ran back to the green Grand Am in which he had arrived (Tr. 354, 388-389). Appellant got in the passenger side of the car, and he and the driver drove off down the street behind the auto parts store (Tr. 355, 388-389). Williams, who watched all of this transpire from her car at the intersection, noticed that appellant was wearing a blue shirt and was bald with a cone-shaped head (Tr. 389-390).

Norman Varner, who was working for waste management near the auto parts store also heard shots (Tr. 454-455). He saw a black man wearing a pair of blue jeans and a blue shirt walk back across the parking lot of the auto parts store and get into the passenger side of the car, which was bluish green (Tr. 456, 459). Varner later positively identified appellant's vehicle in court (Tr. 459-460).

Darrin Mosley was also at the intersection of Jennings Station Road and Lewis & Clark when he heard several gunshots (Tr. 689). Mosley saw two men running toward the intersection along with a child (Tr. 689). A man was chasing them, shooting at them (Tr. 689). The man shot both of the adults, then went back and jumped into a car (Tr. 689). Mosley called 911 (Tr. 689). Mosley described the shooter as a black man, kind of heavy, bald, wearing a blue jacket (Tr. 691). Mosley later viewed a photo line-up and picked appellant out as the

gunman (Tr. 692-694). Mosley also identified a photo of the car (Tr. 696). Mosley was shown a picture of Reece and did not recognize him (Tr. 696).

Williams drove onto the parking lot across the street from the auto parts store and picked up Anderson (Tr. 391-392). Williams and Anderson then checked on Butler, but found he was already dead (Tr. 355, 392). They then checked on Morgan, who was crying out for a paramedic (Tr. 355, 392). Moore had been shot in the back (Tr. 356).

Robert Baumer, a City of Jennings police officer, was at the intersection of 367 and Jennings Station Road when he heard gunshots (Tr. 424-426). Ofc. Baumer informed the dispatcher and then drove to the intersection of Jennings Station Road and Lewis & Clark, where he saw two men lying in the road near the auto parts store (Tr. 427). Witnesses reported two black men in a green sports car and Baumer then saw a green car pulling off the parking lot at the rear of the auto parts store (Tr. 429, 690). Ofc. Baumer gave chase, but lost the speeding car after it went over a hill (Tr. 429-431, 690). Baumer then returned to the auto parts store, where he observed that one victim appeared dead and the other one in pain from a gunshot wound (Tr. 431-432).

Tony Everts was working at a construction site that afternoon on Riverview Boulevard (Tr. 464-465). He saw a teal green Grand Am coming down the street with only three tires; the other wheel was running on the rim (Tr. 467-468). The Grand Am jumped the curb and drove up into the parking lot (Tr. 468). The passenger was a black man wearing a blue shirt (Tr. 469-470).

David McGary, a police officer for the City of Bellefontaine Neighbors, heard the radio report of gunshots at the intersection of Jennings Station Road and Lewis & Clark Boulevard (Tr. 477). McGary went to the intersection of Chain of Rocks and Riverview Boulevard where he saw some construction workers (Tr. 479). McGary asked if they had seen a vehicle

traveling through there at a high rate of speed (Tr. 479). The workers said they saw a vehicle travel through the gate into a parking lot just north of where they were working at the end of a bridge (Tr. 470-471, 480). McGary went into the parking lot off of Riverview Boulevard and found a green Pontiac parked in the weeds with the driver's side door open (Tr. 435, 480, 482, 520, 521). A bluish shirt was found hanging in a bush in front of the car, off to the right (Tr. 483, 521-522).

Officer Lee Davis was a police officer for the city of Moline Acres (Tr. 488). He heard the radio report of the shooting and headed toward the area (Tr. 488-489). He heard that officers were in pursuit of the vehicle and headed in the direction of the pursuit, ending up at 9514 Riverview, where the vehicle had been abandoned (Tr. 489). When Ofc. Davis observed the car, he assumed that the occupants had run through the woods towards a creek (Tr. 490). Beyond the creek was a wooded area, a brick wall, and then a truck lot on Hall Street (Tr. 491, 495). Ofc. Davis went to the front of the businesses on Hall Street because this was the best point of exit from where the subjects went into the woods (Tr. 496). It was about half a mile from the parking lot where the car was found to the truck lot on Hall Street (Tr 496).

Shortly after Ofc. Davis positioned himself, he saw two men coming from the back of the truck lot (Tr. 359-360, 435, 496). They were walking at a fast pace, and kept looking back and stumbling over one another (Tr. 496). The two men were covered from the waist down with mud and water and were sweaty (Tr. 437, 496-497). Ofc. Davis watched the men come out the front of the truck lot and then ordered the men to halt and raise their hands (Tr. 497). One subject, later identified as Reece, stopped after three or four more steps; the other subject, later identified as appellant, continued on for another 12 to 20 feet (Tr. 497, 498). Appellant stopped after he was warned to halt a second time (Tr. 499).

The police took Anderson and Williams to view the car they had found (Tr. 395). Both positively identified the abandoned green Grand Am as the vehicle involved in the shooting (Tr. 356-357, 395-396, 635-636). The police then drove Williams and Anderson by the two men they had apprehended (Tr. 396, 631). They both identified appellant as the passenger in the car and the shooter at the parking lot (Tr. 358-359, 396-397, 500). No one identified Reece (Tr. 500, 634). Appellant and Reece were then turned over to the St. Louis City police because that was the jurisdiction in which they were stopped (Tr. 349, 635).

The police searched along Duenke Road, the street appellant and Reece took as they left the auto parts store, and found a Glock nine millimeter handgun several houses down on what would have been the passenger side of the road as they drove away from the auto parts store (Tr. 394, 440-441, 518). The pistol had a modified magazine which allowed the gun to hold seventeen cartridges (Tr. 526). A total of 17 shell casings were collected from the auto parts store parking lot and roadway (Tr. 508-512). Tests revealed that all of the shells were fired from the Glock (Tr. 527-528).

Appellant's fingerprints were found on the top of the vehicle over the passenger door and on a cup on the driver's side floorboard (Tr. 552). Reece's fingerprints were found on the driver's side rear window, the driver's side top of the door, and on a bottle of cognac on the driver's side rear seat (Tr. 552).

On November 4, Anderson and Williams went to the police station to view a live line-up (Tr. 361, 398). Both separately identified appellant (Tr. 361-362, 399, 574-578). They both also identified appellant in court (Tr. 363, 400).

Roland Moore suffered from a gunshot wound through the liver and right chest (Tr. 567). He suffered from ongoing bleeding despite two operations (Tr. 567). The gunshot had

injured the right adrenal gland, right hepatic vein, liver, and right lower lobe of the lung (Tr. 568).

Dion Butler suffered four gunshot wounds, including one in the back (Tr. 624). Butler died from the gunshot wound to the back; the bullet traveled through the back into the neck and injured the spinal cord near that portion of the brain that controls breathing, causing Butler's body to shut down (Tr. 628).

Defendant did not testify in his own defense. At the close of evidence, instructions, and argument by counsel, the jury found guilty of first degree murder, first degree assault, and two counts of armed criminal action (LF 5, 54-57; Tr. 805). The trial court, having found appellant to be a prior and persistent offender (Tr. 344), sentenced appellant to life without parole on the murder count, and thirty years on all of the other counts, all time to run consecutively (LF 5, 63-65; Tr. 812).

ARGUMENT

I.

THE TRIAL COURT DID NOT PLAINLY ERR IN OVERRULING APPELLANT'S MOTION TO SUPPRESS IDENTIFICATION AND IN ALLOWING EVIDENCE OF THE LINE-UP IDENTIFICATIONS BY BEVERLY WILLIAMS AND HAROLD ANDERSON ON THE GROUND THAT COUNSEL FOR APPELLANT WAS NOT PRESENT AT THE LIVE LINE-UP BECAUSE APPELLANT WAS NOT ENTITLED TO COUNSEL AT THE LINE-UP IN THAT HIS SIXTH AMENDMENT RIGHT TO COUNSEL HAD NOT ATTACHED IN THAT NO FORMAL CHARGES HAD YET BEEN FILED, NOR HAD APPELLANT BEEN ARRAIGNED AT THE TIME OF THE LINE-UP.

FURTHERMORE, EVEN IF APPELLANT SHOULD HAVE BEEN ALLOWED COUNSEL AT THE LINE-UP, THERE WAS NO MANIFEST INJUSTICE OR MISCARRIAGE OF JUSTICE IN FAILING TO EXCLUDE THE EVIDENCE IN THAT EVEN ABSENT THE IDENTIFICATIONS FROM THE LIVE LINE-UP ALL OF THE TRIAL EVIDENCE PROVED THAT ONLY APPELLANT COULD HAVE BEEN THE SHOOTER.

Appellant contends that the trial court plainly erred in overruling his motion to suppress and in allowing evidence of Beverly Williams's and Harold Anderson's identifications of him from a live line-up because the line-up was allegedly improper in that appellant's right to counsel had attached and counsel was not present for the line-up.

A. Facts.

Both Williams and Anderson identified appellant in a show-up fifteen minutes after the shooting occurred (Tr. 358-359, 396-397, 500). A complaint was filed on November 1, 2000 (LF 7). Patrick Conroy, a public defender, surrendered appellant to the custody of the police

(Tr. 73). Conroy told Det. Sheehan that if they were to conduct a line-up, he would like to know about it (Tr. 73).

On November 2, 2000, appellant appeared in the associate division of the circuit court, without an attorney, and the complaint was read to him (LF 1). On November 3, 2000, a live line-up was held at the St. Louis County jail facility, at which both Williams and Anderson again identified appellant (Tr. 361-362, 399, 574-578). Prior to the line-up, Det. Sheehan, who put together the line-up, called Patrick Conroy, to tell him about the line-up (Tr. 72-73, 590). When Conroy arrived at the jail, the line-up had already taken place (Tr. 590-591).

An indictment was filed against appellant on February 1, 2001 (LF 1). Appellant was arraigned on the indictment on February 14, 2001 in the circuit division (LF 2).

Appellant filed a motion to suppress, but did not claim that the line-up identifications should have been suppressed because he did not have counsel. Nor did he raise this claim in his motion for new trial. Thus, appellant seeks plain error review of his claim (App.Br. 29).

B. Standard of review.

"The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." ***State v. Roberts***, 948 S.W.2d 577, 592 (Mo.banc 1997), *cert. denied*, 118 S.Ct. 711 (1998). Appellant must demonstrate that manifest injustice or a miscarriage of justice will occur if the error is not corrected. ***Id.*** '"[U]nless a claim of plain error facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted,' this Court will decline to exercise its discretion to review for plain error under Rule 30.20." ***Id., citing State v. Brown***, 902 S.W.2d 278, 284 (Mo.banc 1995), *cert. denied*, 516 U.S. 1031 (1995).

"Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice

inexorably results if left uncorrected. Appellate courts use the plain error rule sparingly and limit its application to those cases where there is a strong, clear demonstration of manifest injustice or miscarriage of justice. The determination of whether plain error exists must be based on a consideration of the facts and circumstances of each case. A defendant bears the burden of demonstrating manifest injustice or miscarriage of justice." ***State v. Varvera***, 897 S.W.2d 198, 201 (Mo.App., S.D. 1995) (citations omitted).

C. Analysis.

Where adversary judicial proceedings have been initiated and the right to counsel has attached, a pretrial corporeal lineup constitutes a critical stage of the criminal prosecution, at which the defendant is entitled to counsel. ***Moore v. Illinois***, 434 U.S. 220, 226, 98 S.Ct. 458, 464, 54 L.Ed.2d 424, (1977). "Attachment of the right to counsel occurs at the initiation of adversary judicial proceedings against an accused by way of formal charge, preliminary hearing, indictment, information, or arraignment." ***State v. Washington***, 9 S.W.3d 671, 675 (Mo.App.E.D. 1999). There is no dispute that at the time of the line-up in question, an indictment or information had not been filed against appellant, nor had he been subjected to a preliminary hearing. Rather, appellant's assertions rest on his belief that a formal charge had been filed and/or he had been arraigned. However, appellant's right to counsel had not yet attached as of November 3, 2000, the date of the line-up, as he had not been accused by way of formal charge and had not been arraigned.

1. Formal charges had not been filed at the time of the line-up.

In ***Kirby v. Illinois***, 406 U.S. 682, 688-89, 92 S.Ct. 1877, 1881-82, 32 L.Ed.2d 411 (1972), the Supreme Court held that the Sixth Amendment right to counsel attached only at or after the time that adversary judicial proceedings had been initiated by way of formal charge, preliminary hearing, indictment, information, or arraignment. The Supreme Court explained

that it was only at that point that "the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." ***Id.*** at 689, 92 S.Ct. at 1882.

It is well settled that an arrest is not a formal charge giving rise to a right to counsel. ***United States v. Gouveia***, 467 U.S. 180, 190, 104 S.Ct. 2292, 2298, 81 L.Ed.2d 146 (1984). Complaints, which serve only as a basis for a judicial determination of probable cause, are usually issued before an arrest even occurs. ***United States v. Moore***, 122 F.3d 1154, 1156 (8th Cir. 1997). Supreme Court Rules 22.02, 22.04. This is what occurred in the present case, in that the state filed a complaint in order to obtain a warrant for appellant's arrest (LF 7). "If an arrest does not trigger the Sixth Amendment right to counsel, we are unable to see how the issuance of a complaint that serves as the basis for a probable cause determination authorizing a later arrest would trigger that right." ***Id.*** Thus, the 8th Circuit in ***Moore*** determined that a complaint was not the type of "formal charge" contemplated by ***Kirby***.

The analysis in ***Moore*** as to complaints under the Federal Rules of Criminal Procedure is equally applicable to complaints filed in Missouri state courts. A complaint is not a formal charge. "The filing of a complaint . . . does not constitute a criminal prosecution, but is the first step in instituting a criminal charge." ***State v. Rhodes***, 591 S.W.2d 174, 175 (Mo.App.E.D. 1979); ***Vaughn v. State***, 763 S.W.2d 232, 236 (Mo.App.W.D. 1988). A complaint is only the first step in the information proceeding, its purpose being to advise a defendant of the charges against him and to allow the court to determine if the accused should be bound over to stand trial. ***Pippenger v. State***, 794 S.W.2d 717, 723 (Mo.App.S.D. 1990). "*The actual charge occurs when the information is filed*." ***Id.***

Thus a complaint is not a formal charge. And thus, Missouri courts have held that the filing of a complaint does not result in the attachment of a Sixth Amendment right of counsel.

State v. Thomas, 698 S.W.2d 942, 948 (Mo.App. S.D. 1985), *citing* ***State v. Beck***, 687 S.W.2d 155, 160 (Mo.banc 1985).

There is an Eighth Circuit case, ***Manning v. Bowersox***, 310 F.3d 571 (8th Cir. 2002), that rejected the state's argument that no right to counsel had attached because a defendant was only charged by complaint. ***Id.*** at 575. The court in ***Manning*** held that the right to counsel attaches to interrogations even if only a complaint had been filed. ***Id.*** The opinion makes no analysis of why or how filing a complaint constitutes an adversarial proceeding and makes no discussion whatsoever of ***Moore***. It also ignores and conflicts with Missouri law which, as noted, states that a complaint is not a formal charge and does not result in the attachment of a Sixth Amendment right of counsel. ***State v. Beck***, ***supra.*** The ***Manning*** decision, which conflicts with Missouri law and with other Eighth Circuit decisions, such as ***Moore, supra***, should not be followed.

Manning also conflicts with the Eighth Circuit's recent decision in ***Beck v. Bowersox***, 362 F.3d 1095 (8th Cir. 2004). In ***Beck***, the defendant argued that his Sixth Amendment rights were violated when his statements were taken after the prosecutor filed a warrant affidavit reciting that he was charged with two counts of first degree murder. ***Id.*** at 1100-1101. The Eighth Circuit rejected this argument, noting that under Missouri law, a prosecution is commenced either when an indictment is found or an information filed. ***Id.*** at 1101. The Eighth Circuit also noted that the United States Supreme Court had "given further indication that the Sixth Amendment right to counsel does not attach at the complaint/arrest or warrant/arrest stage of a typical felony investigation," noting that the Supreme Court had not expanded the protections of the Sixth Amendment right to counsel so as to override a suspect's valid ***Miranda*** waivers. ***Id.*** at 1102. Ultimately, the Eighth Circuit upheld this Court's decision in ***State v. Beck***, 687 S.W.2d 155 (Mo.banc 1985), *cert. denied*, 476 U.S. 1140

(1986), wherein this Court ruled that the swearing out of an ex parte affidavit (the equivalent of a complaint) and the issuance of an arrest warrant were not the initiation of adversary judicial proceedings and thus the defendant's Sixth Amendment rights had not attached. The Eighth Circuit specifically stated that this Court's ruling in ***Beck*** "was neither contrary to nor an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. ***Id.*** at 1102 (quotation and citations omitted).

Other cases have also held that the filing of a complaint and arrest warrant does not institute attachment of the Sixth Amendment right to counsel. ***See, e.g., Von Kahl v. United States***, 242 F.3d 783, 789 (8th Cir. 2001) (filing of complaint and issuance of arrest warrant is not initiation of an adverse judicial proceeding); ***United States v. Mendoza-Cecelia***, 963 F.2d 1467, 1473-1474 (11th Cir. 1992) (appearance before magistrate does not cause Sixth Amendment rights to attach; such appearance is "largely administrative" where charges are read, ***Miranda*** rights read, and bail set).; ***Hines v. Summer***, 942 F.2d 791 (9th Cir. 1991) (Sixth Amendment rights not implicated when defendant arrested and "First Appearance and Notice of Arraignment" was filed); ***United States v. Langley***, 848 F.2d 152 (11th Cir. 1988) (filing of complaint and issuance of warrant does initiate adversarial judicial proceedings); ***United States v. Pace***, 833 F.2d 1307, 1312 (9th Cir. 1987) (FBI's filing of complaint and arrest warrant did not constitute initiation of adversary proceedings sufficient to cause Sixth Amendment rights to attach).

Moore, ***Beck, Thomas,*** and ***Pippenger***, ***supra***, apply the correct analysis because they recognize the fact that a complaint, while the first step taken in instituting a criminal charge, does not itself constitute an adversarial proceeding. A complaint is merely a document filed in court in order to provide a basis for a probable cause determination authorizing a later arrest. It serves only to advise a defendant of the allegations against him and to allow the court to

determine if the defendant should be bound over to stand trial. ***Pippenger, supra***. See Supreme Court Rule 22.08.

While there is one Missouri case, ***Arnold v. State***, 484 S.W.2d 248 (Mo. 1972), which held that filing a complaint and issuing a warrant did initiate adversary judicial proceedings, that case was expressly overruled by this Court in ***Morris v. State***, 532 S.W.2d 455 (Mo.banc 1976), noting that ***Arnold*** conflicted with numerous other Missouri cases that held that one was not entitled to counsel at a line-up unless the line-up occurred post indictment or post information. ***Morris, supra***, at 456-458.

Appellant, however, argues that by filing the complaint and obtaining a warrant for appellant's arrest, the state had "commit[ted] to prosecuting Mr. Crawford." (App.Br. 26-27). Respondent is unaware of any definition as to what exactly is necessary to constitute "commitment to prosecution" on the part of the state. However, the mere filing of a complaint in Missouri is not a commitment to prosecute.

First of all, as already discussed amply above, Missouri law does not consider a complaint to be a formal charge. Furthermore, filing a complaint cannot be considered a "commitment" to prosecute when in fact, a prosecutor *may not prosecute someone based on a complaint*, for a felony. Missouri case law is quite clear that a prosecution must be based on an information or an indictment. ***See State v. Stringer***, 36 S.W.3d 821, 822 (Mo.App.S.D. 2001); ***Chambers v. State***, 24 S.W.3d 763 (Mo.App.W.D. 2000) (criminal case can only be instituted by information or indictment). Indeed, the failure to file an information or indictment is a jurisdictional defect, and without an information or indictment, no conviction can be obtained. ***Brown v. State***, 33 S.W.3d 676, 678 (Mo.App.S.D. 2000). ***See also Turnage v. State***, 782 S.W.2d 785 (Mo.App. S.D. 1989) (there can be no conviction or punishment absent the filing of an information or indictment). Thus, the filing of a complaint cannot

constitute a "commitment to prosecute" when legally there is no jurisdiction to prosecute anything until an information or indictment is filed. As the Southern District said in ***Pippenger***, "The actual charge occurs when the information is filed." ***Pippenger, supra,*** at 723.

More evidence that the mere filing of a complaint is not a formal charge is the fact that the filing of a complaint does not toll the statute of limitations on a crime. A prosecution commences for purposes of the statute of limitations when an information is filed or an indictment returned and not when the complaint is filed in a felony case. ***State ex rel. Morton v. Anderson***, 804 S.W.2d 25, 26 (Mo.banc 1991); ***State v. Love***, 88 S.W.3d 511, 520 (Mo.App.S.D. 2002); ***Collins v. State***, 887 S.W.2d 442, 444 (Mo.App.W.D. 1994) (prosecution not commenced at time of filing of complaint and arrest of defendant); ***State v. Thompson***, 810 S.W.2d 85 (Mo.App.E.D. 1991). If the filing of a complaint is to be considered a formal charge, as appellant suggests, should it not also serve to toll the statute of limitations? Missouri law clearly states that it does not.

Appellant cites to ***Brewer v. Williams***, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) in support of his claim. Appellant notes that the defendant in that case, Williams, had been arrested on a warrant, was arraigned before a judge on the outstanding warrant, advised of his right to counsel, and committed to jail (App.Br. 27). Subsequently, the police obtained incriminating statements from him.[2] The United States Supreme Court found, in part, Williams' rights were violated because his Sixth Amendment right to counsel had attached. ***Brewer v. Williams,*** 430 U.S. at 399.

The difference between ***Brewer v. Williams*** and the present case, obviously, is that ***Brewer v. Williams*** interprets Iowa procedural law and the Iowa courts had all agreed that

[2]This is the infamous "Christian burial speech" case.

under Iowa law, Williams's Sixth Amendment rights had attached. 97 S.Ct. at 1240, n. 7, 1241, n. 9. Furthermore, the state did not contend that "judicial proceedings had been initiated against Williams." 97 S.Ct. at 1239.

In the present case, as shown above, Missouri courts interpreting Missouri law, have held that the filing of a complaint does not constitute the institution of adversarial judicial proceedings. Other states have similarly held. ***See, e.g., State v. Council*** 515 S.E2d 508 (SC 1999) (Sixth Amendment rights only attach post indictment); ***State v. Register***, 476 S.E.2d 153 (SC 1996); ***People v. Wheeler***, 590 N.E.2d 552 (Ill.App.2d.Dist. 1991) (filing of a complaint does not constitute a commitment to prosecute); ***Gilchrist v. State***, 585 So.2d 165 (Al.Cr.App. 1991) (adversary prosecutorial proceedings do not begin until indictment filed); ***Waldrop v. State***, 523 So.2d 475 (Al.Cr.App. 1987); ***State v. Falcon***, 494 A.2d 1190 (Sixth Amendment rights attach when defendant enters plea at arraignment).

In appellant's case, formal charges were not filed against him until the return of the indictment on February 1, 2001, well after the date of the line-up on November 3, 2000 (LF 1). Thus, appellant was not entitled to have an attorney present at the line-up.

2. Appellant had not been arraigned at the time of the line-up.

Appellant also argues that he was arraigned on November 2, 2000, relying on the fact that he appeared in court and was read charges (App.Br. 22). According to the Supreme Court Rule 24.01, an arraignment "shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto." This is distinguished from an initial appearance, which is described in Supreme Court Rule 22.08, which states that when the defendant makes his initial appearance before the judge, he shall be informed of the felony charged and his ***Miranda*** rights.

An arraignment is similarly described in the Federal Rules of Criminal Procedure, which state that an arraignment must consist of ensuring that the defendant has a copy of the information or indictment, reading the information or indictment to the defendant, and asking the defendant to enter a plea. Federal Rules of Criminal Procedure 10.

Arraignment is similarly defined in Black's Law Dictionary: "Procedure whereby the accused is brought before the court to plead to the criminal charge against him in the indictment or information. The charge is read to him and he is asked to plead 'guilty'or 'not guilty' or, where permitted, 'nolo contendere.' (Citation omitted). Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead."

Appellant was not subjected to an arraignment, as defined by the Missouri Supreme Court rules, when he appeared in court on November 2 as he was not asked to enter a plea. This procedure (notwithstanding how the court might label it) was not an arraignment under Missouri law, appellant had therefore not been arraigned, and thus his Sixth Amendment rights had not attached.

Appellant, however, asserts that there are two uses of the word "arraignment" – the one described above and another one which refers generally to the initial appearance in court after an arrest, at which time the charges are read and the defendant is informed of his ***Miranda*** rights, but he is *not* asked to enter a plea. Essentially, appellant is arguing that an "initial appearance" is what the United States Supreme Court meant by "arraignment."

First of all, if the United States Supreme Court had wanted an "initial appearance" to be one of the crucial points at or after which Sixth Amendment rights attach, it certainly could have expressly said so, but did not. Appellant cites to a Florida case, ***Owen v. State***, 596 So.2d

985, 989 (Fla., 1992) to support his argument that his initial appearance was an "arraignment." Appellant relies on the Florida Supreme Court's that the United States Supreme Court, in ***Kirby*** and in ***Michigan v. Jackson***, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), was "apparently" using the term "arraignment" in the sense appellant puts forward now (App.Br. 31, *citing* ***Owen***, 596 So.2d at 989, n.7).

The United States Supreme Court in ***Jackson*** never defines "arraignment." It would appear from the opinion that the parties and the courts all simply referred to the procedure, which to the extent described would have been akin to an initial appearance in Missouri, as an arraignment. The State apparently argued as to one of the two involved defendants that his Sixth Amendment rights had not attached at the point of this "arraignment" or "initial appearance" but there is no explanation as to what the State's argument was. ***Jackson***, 106 S.Ct. 1404, 1407 (n.7). The Supreme Court stated, in a footnote, that the State's argument was untenable because of their "clear language in our decisions about the significance of arraignment." ***Id.*** All this statement does is reiterate that Sixth Amendment rights attach at an arraignment. It does not define what constitutes an arraignment.

Appellant cites to other jurisdictions that have held that an "initial appearance" constitutes the initiation of adversary judicial proceedings (App.Br. 33-34). All this really shows is that those jurisdictions consider an initial appearance to be an arraignment. And of course, federal courts, including the Supreme Court, look to what constitutes the initiation of judicial proceedings per the underlying state's law. ***See Moore v. Illinois***, 98 S.Ct. 458, 464 ("The prosecution in this case was commenced *under Illinois law* when the victim's complaint was filed in court." (Emphasis added))[3].

[3]But see the discussion of ***Manning v. Bowersox***, ***supra***, which fails to take into account the underlying law in the State of Missouri.

Appellant suggests that the initial appearance is crucial in Missouri jurisprudence because Supreme Court Rule 31.02 states that if a person is without counsel upon his first appearance before a judge, it shall be the duty of the court to advise him of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel. If this advisement is the crucial information that signifies attachment of Sixth Amendment rights, then one may as well state that these rights attach upon arrest or shortly subsequent thereto, since a defendant is usually informed of these same precise rights at that time as well. As already noted, case law is clear that arrest does not cause Sixth Amendment rights to attach. ***See United States v. Gouveia, supra***.

Thus, because in the present case adversary judicial proceedings had not been initiated against appellant by way of formal charge, preliminary hearing, indictment, information, or arraignment, his Sixth Amendment right to counsel had not attached at the time of the line-up. ***Kirby v. Illinois, supra.*** Appellant was therefore not entitled to have an attorney present for the line-up.

Amici, in support of appellant, suggest that mere arrest and incarceration triggers the right to counsel (Amicus Brief at 6). Amici cite to §544.170, RSMo in support; this statute states that persons arrested and confined in jail without a warrant must be discharged within 20 hours from arrest unless they are charged with a criminal offense by the oath of some credible person. The statute further states that anyone confined to which the provisions of this section apply, shall be permitted at any reasonable time to consult with counsel, and that failure to permit this constitutes a misdemeanor. §§544.170.3-.544.170.4.

This statute is not in any way, shape, or form authority to support a claim that appellant's Sixth Amendment right to counsel had attached. Rather, as previously noted, it is well settled that an arrest is not a formal charge giving rise to a right to counsel. ***United States v. Gouveia***,

467 U.S. 180, 190, 104 S.Ct. 2292, 2298, 81 L.Ed.2d 146 (1984). The Sixth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings had been initiated by way of formal charge, preliminary hearing, indictment, information, or arraignment. ***Kirby v. Illinois***, 406 U.S. 682, 688-89, 92 S.Ct. 1877, 1881-82, 32 L.Ed.2d 411 (1972). Appellant's Sixth Amendment rights did not attach simply because he was arrested and incarcerated pending the filing of charges. If this were true, then the holding in ***Kirby*** itself would be incorrect because in ***Kirby,*** the defendant was found not to be entitled to counsel for a line-up that was held post-arrest but prior to the filing of formal charges. ***See also United States v. Purham***, 725 F.2d 450 (8th Cir. 1984) (an arrest does not initiate adversarial judicial proceedings resulting in attachment of Sixth Amendment right to counsel).

D. Did appellant invoke Sixth Amendment right to counsel?

Even if appellant is right and his right to Sixth Amendment counsel attached at his initial appearance before a judge, as opposed to at his arraignment, this is not the end of the inquiry. Attachment of the right to counsel alone does not guarantee a defendant the assistance of counsel. ***United States v. Harrison***, 213 F.3d 1206, 1209 (9th Cir. 2000). Rather, a defendant must also invoke the Sixth Amendment right by either hiring a lawyer or asking for appointed counsel.[4] ***Id.***

"Attachment and invocation are distinct legal events." ***Id.*** Furthermore, attachment must precede invocation; put another way, one cannot invoke a right that has not attached. ***Id.*** at 1210.

In the present case, even if one assumes that the Sixth Amendment right to counsel had attached, the record is devoid of evidence that appellant invoked that right. An assertion of a

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[4]Or, of course, the defendant may waive his Sixth Amendment right to counsel altogether and represent himself if he so chooses.

right to counsel requires an actual, positive statement or affirmation by the defendant of his right to counsel and his desire to have counsel. Respondent is not aware of any such statements or assertment by appellant in the record in the present case. And of course, since appellant's claim is reviewable only for plain error, in that appellant did not raise this issue before the trial court, the burden is upon appellant to show that such a statement or assertment was made.

Appellant, no doubt, would assert that the fact that a public defender, Patrick Conroy, surrendered appellant to the custody of the police (Tr. 73), indicated that he had invoked his right. This is insufficient for several reasons.

First of all, there is nothing in the record to suggest that appellant had retained Mr. Conroy for the purpose of representing him on the charges at issue herein. ***See Texas v. Cobb,*** 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001) (Sixth Amendment rights are offense specific). Mr. Conroy was a public defender and, of course, could not be "retained" or "hired" by appellant in the literal sense. Nor was Conroy appointed by the trial court to represent appellant at any time prior to the line-up. Indeed, any argument that appellant may make that Mr. Conroy was his attorney for the purpose of the murder charges at the time of the line-up is belied by the record: no one, neither the public defender nor private counsel, made an appearance at appellant's initial appearance and the cause was actually continued so that appellant might obtain an attorney (LF 1). Logically, there would be no reason for appellant to obtain an attorney if he already had one. A public defender, Lisa Chazen, made an entry of appearance on November 8, four days after the line-up (LF 1). Mr. Conroy did not make an entry of appearance until November 15 (LF 1).

Furthermore, the mere fact that the public defender eventually made an appearance in the case on appellant's behalf does not establish that appellant requested counsel. In ***United***

States v. Spruill, 296 F.3d 580, 586 (7th Cir. 2002), the defendant argued that while he never verbally invoked his right to counsel, his right was implicitly asserted when someone from the public defender's office was assigned to him at his initial appearance. The Seventh Circuit rejected that argument, finding that the appointment of an attorney, without some positive affirmation of acceptance or request of the assistance of counsel on the part of the defendant, does not constitute the assertion of one's Sixth Amendment right to counsel. ***Id.*** at 587.

Finally, the fact that Conroy asked Officer Sheehan to call him and inform him about the line-up is not evidence that appellant was entitled to have Conroy or any other attorney present for the line-up. The record showed that Sheehan contacted Conroy as a courtesy because Conroy asked him to (Tr. 72-73). Conroy could not assert any right on appellant's behalf. ***See, e.g., Moran v. Burbine***, 475 U.S. 412, 421-422, 106 S.Ct. 1135, 1141-1142, 89 L.Ed.2d 410 (1986); ***Matney v. Armentrout***, 956 F.2d 824, 825-826 (8th Cir. 1992); ***State v. Beck*** 687 S.W.2d 155, 159 (Mo.banc 1985), *cert. denied*, 476 U.S. 1140 (1986) (all holding that retained attorney cannot assert client's Fifth Amendment rights for him).

The bottom line is that respondent is not aware of any place in the record that reflects that appellant ever invoked his right to counsel, certainly not at the line-up. Appellant may argue that it was the State's burden to prove that he had made a valid waiver of his right to counsel, noting that courts indulge a presumption against waiver, whether at trial or at a critical stage of pretrial proceedings. ***See Brewer,*** at 404. However, it must be recalled that appellant never raised this claim to the trial court. By not raising the claim in a timely manner, appellant essentially foreclosed any opportunity for the state to make what record it could to establish that appellant was not entitled to counsel at the line-up.

For example, in ***State v. Galazin***, 58 S.W.3d 500, 501 (Mo.banc 2001), the defendant was convicted of driving while intoxicated. He did not file a motion to suppress, but in the

middle of trial, objected to the police officer's testimony about his driving, on the ground that the state failed to prove that the officer had authority to make an arrest in the area in which he encountered appellant. ***Id.*** at 502-504. On appeal, he claimed that because the state bears the burden of proof on a motion to suppress, the state should have proved, at trial, that the officer had authority to arrest appellant, by offering into evidence the mutual aid contract conveying this authority. ***Id.*** at 504-505.

In denying this claim, this Court stated that one of the reasons for requiring claims of improper searches and seizures to be raised before trial:

> is so the basis of the claim of unlawful search or seizure will be known, giving the state a fair chance to respond and the trial court a fair opportunity to rule on the claim. The rule helps to eliminate the possibility of sandbagging with respect to an issue not relating to guilt or punishment.

Id. at 505. This Court held that where a defendant does not raise the claim regarding the improper search and seizure in a motion to suppress filed before trial, "the accused loses the benefit of the presumption at a hearing on a timely filed motion to suppress that all warrantless searches and seizures are invalid." ***Id.*** at 505. Therefore, "the defendant bears the burden of establishing the unlawfulness of the police conduct." ***Id.***

Similarly, in the present case, because appellant did not raise this issue in a timely manner, the state did not have a fair chance to respond. The burden thus falls to appellant to establish that he was entitled to counsel at the line-up as a matter of law and fact. He has failed to do so.

D. No manifest injustice.

Ultimately, however, this Court need not even decide whether appellant was formally charged or arraigned, whether his Sixth Amendment rights had attached or whether he had

invoked them because even if one were to assume, for the sake of argument, that appellant was entitled to counsel at the line-up, appellant is not entitled to reversal of his case.

The remedy in the event of a Sixth Amendment violation in connection with a line-up is exclusion of all testimony regarding the out-of-court line-up. This testimony is rendered inadmissible *per se*. ***Gilbert v. California***, 388 U.S. 263, 273, 87 S.Ct.1951, 1957, 18 L.Ed.2d 1178 (1967); ***State v. Abram***, 632 S.W.2d 60, 61 (Mo.App.E.D. 1982).

Appellant also argues that Anderson's and Williams's in-court identifications should have been excluded because of the alleged Sixth Amendment violation at his line-up, asserting that their in-court identifications were "tainted" by the live line-ups. However, both Anderson and Williams had an independent basis for their identification in that they first viewed and identified appellant in a show-up with Robert Reece minutes after the crime (Tr. 358-359, 396-397, 500).

Reliability of an in-court identification is examined under the totality of the circumstances, including 1) the opportunity of the witness to view the defendant at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's prior description; 4) the level of certainty demonstrated by the witness at the time of the identification; and 5) the length of time between the crime and the identification. ***State v. Winston***, 959 S.W.2d 874, 878-879 (Mo.App.E.D. 1997).

Williams watched the whole shooting unfold from her car (Tr. 19, 386-391). Anderson saw appellant exit the passenger side of the Grand Am, approach them, pull a gun out from under his shirt, and open fire on them (Tr. 19, 274-275, 350-352, 353-355). There should be no issue as to the witness's degree of attention. The witness's descriptions were accurate. Williams described a bald-headed man with a cone-shaped head (Tr. 19, 301, 636). Anderson described a bald black male (Tr. 18, 271, 383, 636). Williams was sure of her identification

at the show-up (Tr. 22, 33, 396, 633). Anderson picked appellant but said he was not sure at the time of the show-up (Tr. 277, 358, 752). However, after having time to think about it, and without viewing another line-up, he felt sure of his choice (Tr. 645). The show-up occurred only minutes after the shooting occurred (Tr. 31, 397-398, 605-606). Taking these factors as a whole, both witnesses had an independent basis for their identification – the actual witnessing of the crime – and thus their in-court identifications were admissible even if there were an impropriety with the live line-up in that counsel was not and should have been present.

In any event, assuming ***arguendo*** that appellant had a right to counsel at the line-up, the question becomes whether appellant suffered a manifest injustice or miscarriage of justice because this evidence – whether the live line-up or the live line-up and the in-court identifications - was not excluded.

First of all, it must be noted that the only identification issue was whether the shooter was appellant or the driver, Robert Reece. There is no argument that some unknown third party could have been responsible for the shooting. Appellant acknowledges this in his closing argument, implying that Reece was the shooter (Tr. 778, 781, 783**).**

Given that, what would the evidence have been had the evidence of the live line-up been excluded? The evidence would have been that three people, Anderson, Williams, and Mosley, identified appellant as the shooter. Anderson and Williams did at the show-up (Tr. 358-359, 395-397).[5] Mosley did from a photo line-up, and that identification is not even at issue in this

[5]Appellant argues that Anderson did not pick out appellant at the show-up (App.Br. 27-28). Anderson testified repeatedly that he did pick out appellant, and Officer Kardasz testified at the motion to suppress hearing that Anderson said appellant looked like the shooter, but that he was not sure (Tr. 22-23). A week later, and without viewing another line-up, Anderson told Kardasz that the more he thought about it, the more he was sure that

point (Tr. 692-694). *None* of the witnesses *ever* identified Robert Reece as the shooter (Tr. 500, 634, 696). They did not even recognize him. Anderson and Williams had the perfect chance to differentiate between the two at the show-up minutes after the crime and neither picked Reece as the shooter.

Furthermore, all witnesses agreed that the shooter was in the passenger seat of the car. (Tr. 351-355, 387-389, 691). The shooter/passenger in the car was described as wearing a blue shirt and a blue shirt was found outside the abandoned car on the passenger side of the vehicle (Tr. 390, 456, 469-470, 483, 521-522). The murder weapon was found on what would have been the passenger's side of the road along the street leading away from the shooting scene 394, 440-441, 518, 527-528). The witnesses identified appellant as the passenger in the teal green Grand Am (Tr. 359, 389, 696). None of them could identify the driver (Tr. 359, 396, 500, 606, 635, 696). Appellant's fingerprints were found on the passenger side of the Grand Am, while Reece's were on the driver's side (Tr. 552).

Furthermore, Dion Butler, the victim who was murdered, was a suspect in the murder of appellant's brother (Tr. 607-608).

Thus, even absent any evidence regarding the live line-up identifications, all of the evidence points to appellant as the shooter. All of the evidence squarely places the shooter in the passenger seat of the car and appellant's fingerprints are on the passenger side of the car.

Appellant contends that plain error occurred because the error was outcome determinative (App.Br. 29). It was not, as just demonstrated above, in light of the fact that all of the evidence, even absent the evidence appellant felt should have been suppressed indicated that appellant, and only appellant, could have been the gunman.

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appellant was the shooter (Tr. 645).

Thus, even if there were some valid grounds for excluding testimony regarding the live line-up, appellant cannot contend he suffered a manifest injustice or miscarriage of justice when all of the remaining evidence still squarely points to him as the shooter and none of it points to Robert Reece. Appellant's claim is thus without merit and should be denied.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HAROLD ANDERSON'S AND BEVERLY WILLIAMS'S IDENTIFICATION OF HIM AS THE SHOOTER AND ADMITTING THESE IDENTIFICATIONS AT TRIAL BECAUSE THESE IDENTIFICATIONS WERE ADMISSIBLE IN THAT THEY WERE NOT THE RESULT OF AN UNNECESSARILY SUGGESTIVE POLICE PROCEDURE.

Appellant contends that Anderson's and Williams's identifications of him as the shooter should have been suppressed because they were allegedly the result of an unnecessarily suggestive police procedure which created a substantial risk of misidentification.

A. Standard of review.

The appellate court affirms a trial court's ruling on a motion to suppress unless the ruling was clearly erroneous. ***State v. Goff***, 129 S.W.3d 857, 862 (Mo.banc 2004). If the ruling is plausible in light of the record viewed in its entirety, the appellate court will not reverse, even if it would have weighed the evidence differently. ***State v. Lanos,*** 14 S.W.3d 90, 93 (Mo.App.E.D. 1999). The reviewing court considers the facts in the light most favorable to the trial court's ruling and disregards contrary evidence and inferences. ***Id.*** The appellate court gives deference to the trial court's determination of credibility of the witnesses. ***Goff, supra.*** When determining whether evidence should have been suppressed, the court will review the record of the pretrial hearing on the motion to suppress and the record made at trial prior to the introduction of the evidence sought to be suppressed. ***Goff, supra.***

"Identification testimony is admissible unless the pretrial identification procedure was unnecessarily suggestive *and* the suggestive procedure made the identification unreliable. ***State v. Middleton***, 995 S.W.2d 443, 453 (Mo.banc 1999) (emphasis in original). Thus, in

determining the admissibility of identification testimony resulting from allegedly suggestive pretrial identification procedures, the reviewing court engages in a two-step analysis. ***Lanos, supra*** at 95. First, the court determines whether the procedure used made the identification unreliable. ***Id.*** Secondly, if the procedure is found to be suggestive, the court must determine whether the procedure rendered the identification unreliable. ***Id.*** Reliability, rather than suggestiveness, is the linchpin in determining the admissibility of identification testimony. ***Middleton, supra.*** "Identification testimony is admissible unless it resulted from pretrial identification procedures that were unnecessarily suggestive and conducive to irreparable misidentification." ***Lanos, supra.*** "A procedure is unnecessarily suggestive if the identification results not from the witness's recall of firsthand observations, but rather from the procedures or actions employed by the police." ***Id.***

In order to prevail in a challenge to identification testimony, the defendant must *first* establish (1) that the investigative procedures used by the police were impermissibly suggestive, and then (2) that the suggestive procedures made the identification at trial unreliable. ***State v. Vinson***, 800 S.W.2d 444, 446 (Mo. banc 1990); ***State v. Cooper***, 811 S.W.2d 786, 788 (Mo.App. W.D., 1991). Although reliability is the "linchpin" in determining the admissibility of identification testimony, the defendant must first "clear the suggestiveness hurdle" before securing a reliability review. ***Vinson, supra***. ***State v. Jones***, 917 S.W.2d 622, 624 (Mo.App.E.D. 1996).

C. Identifications were not result of suggestive police procedure.

The trial court did not err in overruling appellant's motion to suppress and allowing evidence of Williams's and Anderson's identifications at trial because the investigative procedures used by the police were not impermissibly suggestive..

Appellant faults the police for using a show-up (App.Br. 37). Pretrial show-ups have long been considered valid ways to obtain identifications of defendants. ***State v. Lawrence***, 64 S.W.3d 346 (Mo.App.S.D. 2002); ***State v. Moore***, 925 S.W.2d 466 (Mo.App.E.D. 1996); ***State v. Blanchard***, 920 S.W.2d 147 (Mo.App.E.D. 1996); ***State v. Conway***, 740 S.W.2d 320 (Mo.App.E.D. 1987). ***State v. Winningham***, 733 S.W.2d 3 (Mo.App.E.D. 1987); ***State v. Williams***, 717 S.W.2d 561 (Mo.App.E.D. 1986); ***State v. Bynum***, 680 S.W.2d 156 (Mo.banc 1984); ***State v. Cotton***, 660 S.W.2d 365 (Mo.App.E.D. 1983); ***State v. Greathouse***, 694 S.W.2d 903 (Mo.App.S.D. 1985). "Our courts have consistently held the prompt showing of a suspect to the victim is permissible due to the exigencies of the situation. The showup allows officers to learn quickly whether to release or hold the suspect and whether the search should be continued." ***State v. Moore***, 726 S.W.2d 410, 412 (Mo.App.E.D. 1987).

Nor was there anything suggestive about the show-up. The suspects were not handcuffed (Tr. 35). The officer who took Anderson and Williams to the show-up simply told them that they had stopped two people and that they wanted Anderson and Williams to take a look at them (Tr. 35, 53). No one told the witnesses anything that would have led them to make an identification (Tr. 611-612). There is nothing to indicate that the police encouraged either Anderson or Williams to choose appellant as opposed to Reece. A show up is not impermissibly suggestive when the identifications are not made as a response to suggestions or encouragement by the police but are based upon the witness's own recollection and observation of the defendant. ***State v. Moore***, 726 S.W.2d at 412.

Nor was there evidence that the live line-up at the jail was suggestive.[6] There were a total of five people in the line-up, including appellant (Tr. 573-574). Everyone was dressed

[6]Even if appellant had been entitled to a lawyer at the line-up, as appellant asserts in Point I, ***supra***, the fact that a lawyer was not there does not make the line-up suggestive.

in orange jumpsuits (Tr. 574). All participants were similar in height, weight, race, and sex (Tr. 574). All either had a shaved head or a very close haircut (Tr. 574). Anderson and Williams were separated by about 35-40 feet when they each separately viewed the line-up (Tr. 24, 62, 63, 306, 317, 604, 668). The hallway in which they stood was dark (Tr. 592-593). They did not speak with each other until after the line-up procedure was over (Tr. 84). No pressure was placed on either Anderson or Williams to make a positive identification (Tr. 92). The police did not tell Anderson or Williams whom to pick out (Tr. 286, 578, 648). Williams did not know who Anderson picked until afterward (Tr. 417). Williams did not hear Anderson say anything or see any hand motion by Anderson that would have indicated to her whom he picked (Tr. 417-418).

Thus, nothing suggestive happened at the live line-up. To the extent appellant argues any alleged evidence to the contrary, he ignores the standard of review which is to view the evidence in the light most favorable the trial court's ruling and to ignore any contrary evidence and inferences therefrom.

D. Witnesses' identifications were reliable.

Because there was nothing suggestive about either the show-up or the line-up, the question of reliability need not even be addressed, as reliability becomes an issue only when appellant first establishes that there was something suggestive about the police procedures employed. ***Vinson, supra***. ***State v. Jones***, 917 S.W.2d 622, 624 (Mo.App.E.D. 1996). In any event, Anderson's and Williams's identifications were reliable.

1. Anderson's identification was reliable.

Reliability of an in-court identification is examined under the totality of the circumstances, including 1) the opportunity of the witness to view the defendant at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's prior

description; 4) the level of certainty demonstrated by the witness at the time of the identification; and 5) the length of time between the crime and the identification. ***State v. Winston***, 959 S.W.2d 874, 878-879 (Mo.App.E.D. 1997).

Anderson had an excellent opportunity to view the defendant at the time of the crime. He watched appellant exit the car, walk across the parking lot, approach them, pull a gun, and begin firing, shooting both Moore and Butler (Tr. 19, 274-275, 350-352, 353-355). Anderson estimated that he saw the shooter for five minutes and that appellant got as close as two to six feet to Anderson (Tr. 273, 364). Anderson's description was accurate in that he described a bald black male wearing a bluish shirt (Tr. 18, 271, 383, 636).[7]

At the show-up, Anderson picked out appellant as the man he believed to be the shooter (Tr. 277, 358, 752). While the police officers testified that Anderson, who was only 12 years old at the time of the shooting, picked appellant but said he was not 100% sure, Anderson testified that he was sure at the time that it was appellant (Tr. 23, 281, 606, 633).[8] Anderson also said that the other man, Reece, was not the shooter (Tr. 277, 278, 360, 363, 383, 500, 606, 635). The show-up occurred only 15 minutes after the shooting (Tr. 31, 605-606, 397-398). Moreover, a week later, in giving a statement to the police, and without having viewed any other pictures, line-ups, etc., Anderson stated that after thinking about it, he was sure that

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[7]While appellant was not wearing a blue shirt when stopped by the police, his fingerprints were found on the passenger side of the car and a blue shirt was found in the weeds on the passenger side of the car where the vehicle had been abandoned.

[8]Appellant asserts that Anderson did not identify him (App.Br. 34). Appellant testified that he did identify appellant (Tr. 281). The officers testified that Anderson said appellant looked like the shooter (Tr. 23).

the man he had picked out on the side of the road – appellant – was the shooter (Tr. 285, 646-647, 672).

Anderson was also sure of his identification at the live line-up, and asserted that he based his choice on what he observed at the shooting, not on the prior show-up (Tr. 286, 577).

In ***State v. Middleton***, 995 S.W.2d 443, 454 (Mo.banc 1995), a witness first picked the defendant's photograph out of a group of photos and said that the photograph "resembl[ed] the man" but that he did not believe it was the right man because the man in the picture had shorter hair and seemed slightly heavier. Three months later, the witness immediately identified the defendant in the hallway of the courtroom at a preliminary hearing. ***Id.*** This Court found that even though the witness did not conclusively identify the defendant from the photograph he was shown after the murder, he did indicate that the photo resembled the defendant, and the fact that he did not conclusively identify the defendant from the photo "[did] not necessarily diminish the reliability of his identification." ***Id.*** at 455.

Similarly, in the present case, even if Anderson did not conclusively identify appellant at the show-up, this does not diminish the reliability of his ultimate identification. A week later, having had time to reflect, Anderson was sure of his identification. Anderson did not hesitate in identifying appellant at the live line-up. Anderson was also sure of his identification at the live line-up, and asserted that he based his choice on what he observed at the shooting, not on the prior show-up (Tr. 286, 577). Thus, even if his initial identification was not conclusive, his identification of appellant was still reliable and admissible. Identification testimony is usually admissible because courts rely upon the good sense and judgment of jurors for determining the trustworthiness of the identification. ***State v. Middleton***, ***supra*** at

453, *citing* ***State v. Weaver***, 912 S.W.2d 499, 521 (Mo.banc 1995), *cert. denied*, 519 U.S. 856 (1996).

2. Williams's identification was reliable.

At the time of the shooting, Williams was in her car in the right hand lane at the intersection and had a very clear, unobstructed view of the parking lot (Tr. 19, 386-391). She was able to watch the entire shooting (Tr. 386-391). Williams accurately described the shooter as a bald black man wearing a bluish shirt (Tr. 19, 301, 636). She expressly noted that the shooter had a "pointed" head (Tr. 33, 300, 301, 636).[9] Williams picked out appellant at the show-up and said "definitely" that he was the one who did the shooting (Tr. 22, 33, 396, 633). She did not identify Reece (Tr. 396, 500, 606, 635). Only 15 minutes passed between the shooting and the show-up (Tr. 31, 605-606, 397-398).

Both Anderson and Williams immediately identified appellant in the live line-up which occurred about 10 days after the shooting (Tr. 62, 73, 399-400). They were both sure of their identifications (Tr. 577, 648).

The evidence thus shows that both Anderson's and Williams's identifications were reliable. The witnesses had ample opportunity to observe appellant, described him accurately, and testified that they were sure of their identifications, which took place very shortly after the crime.

Finally, when it comes down the ultimate issue of whether the witnesses chose accurately between Reece and appellant, the fact remains that both Anderson and Williams (and other witnesses) were unequivocal in stating that the shooter was in the passenger seat of the

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[9]Appellant argues that Williams also thought that Reece's head was pointed (App.Br. 36). Williams very expressly testified that while Reece's head was slightly pointed, she was able to distinguish between the two heads and positively identified appellant (Tr. 419).

car and appellant's fingerprints were found on the passenger side of the car while Reece's were found on the driver's side (Tr. 351-355, 359, 387-389, 691, 696). Moreover, the gun used in the shootings was found abandoned on the passenger side of the road leading away from the auto parts store and a blue shirt – which all the witnesses described the shooter as wearing – was found outside the passenger side of the abandoned car (390, 394, 440-441, 456, 469-470, 483, 518, 521-522, 527-528). There can be no doubt from this evidence that the passenger was the shooter and it was appellant's fingerprints that were on the top of the car over the passenger door (Tr. 552).

In sum, the trial court did not err in overruling appellant's motion to suppress and in allowing into evidence Anderson's and Williams's identifications of appellant because those identifications were not the product of suggestive police procedures at the show-up or live line-up and in any event were reliable. Moreover, all of the evidence pointed to appellant and only appellant as the shooter. Appellant's claim is without merit and should be denied.

III.

THE TRIAL COURT DID NOT PLAINLY ERR IN FAILING TO *SUA SPONTE* CONDUCT INDIVIDUAL QUESTIONING OF THE JURORS REGARDING WHETHER THEY HAD SEEN AN ARTICLE IN THE PAPER ABOUT APPELLANT'S TRIAL BECAUSE THERE WAS NO REASON FOR INDIVIDUALIZED QUESTIONING IN THAT THE JURORS ALL INDICATED THAT THEY HAD NOT SEEN THE MORNING PAPER.

Appellant contends that the trial court should have *sua sponte* questioned each juror individually, as opposed to the question it posed to the jury generally, regarding whether or not they had seen the newspaper which contained an article about appellant's trial. Appellant asserts that the trial court's failure to do so resulted in a manifest injustice.

A. Facts.

On Thursday, September 26, 2002, at 3:15 p.m., the jury retired to deliberate (Tr. 795). At about 7:15 p.m., the jury was released for the evening because one of the jurors felt ill (Tr. 801-802).

The next morning, in chambers, the trial court noted that the St. Louis Post-Dispatch had published an article about appellant's case on page C-2 of the paper (Tr. 802). The article included information that the co-defendant, Reece, had been acquitted in a separate trial (Tr. 802). The article also included information that Reece claimed that he never got out of the car, did not know what happened, and drove away when appellant jumped back in the car, and that appellant told him as they ran that he had shot Dion Butler (Tr. 802).

The trial court noted that it had repeatedly admonished the jury not to read newspapers or listen to reports of the trial (Tr. 802). The trial court stated that, at the request of defense counsel, it would bring the jury into the courtroom, remind them that they had been instructed

not to read any articles, and then mention that there had been an article in the Post-Dispatch and ask if anyone had seen it (Tr. 803). In response to the court's proposal, defense counsel replied, "That's fine." (Tr. 803).

The trial court brought the jury into open court with appellant present (Tr. 803). The trial court said, in pertinent part, as follows:

> The reason why I called you in specifically was, you recall I gave you an admonition, I did it through the trial repeatedly, about not reading any newspaper reports or radio reports about the trial. It's come to my attention that there was a newspaper article about the case in this morning's paper. So what I wanted to ask you about, is there any among you that saw the newspaper article?
>
> You're all shaking your heads no. I take it by your silence that none of you have seen the newspaper article, is that correct?

(Tr. 803-804). The record reflects that "[t]he jurors responded, 'That is correct.'" (Tr. 804). The jurors then returned to deliberation and returned a verdict at about 12:30 p.m. (Tr. 804-805).

B. Standard of review.

Appellant did not request any other action from the trial court at trial. Hence, his claim is reviewable only for plain error.

"The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." ***State v. Edwards***, 116 S.W.3d 511, 546 (Mo.banc 2003). To justify plain error review, an appellant's claim must facially establish substantial grounds for believing that a manifest injustice or miscarriage of justice occurred. ***Id.*** Whether a manifest injustice or miscarriage of justice occurred depends on the facts and circumstances of the particular case, and the appellant bears the burden of

establishing a manifest injustice that amounts to plain error. ***State v. Mayes***, 63 S.W.3d 615, 624 (Mo.banc 2001).

"Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice inexorably results if left uncorrected. Appellate courts use the plain error rule sparingly and limit its application to those cases where there is a strong, clear demonstration of manifest injustice or miscarriage of justice. The determination of whether plain error exists must be based on a consideration of the facts and circumstances of each case. A defendant bears the burden of demonstrating manifest injustice or miscarriage of justice." ***State v. Varvera***, 897 S.W.2d 198, 201 (Mo.App., S.D. 1995) (citations omitted).

C. Analysis.

The trial court did not plainly err in failing to *sua sponte* question each juror individually about whether they had seen the article. There was no need to conduct individual questioning when the entire jury had already indicated – twice – that none of them had seen the article.

In ***State v. Howard***, 449 S.W.2d 662, 663 (Mo. 1970), this Court was presented with the issue of whether the trial court erred in refusing to allow appellant to interrogate the jurors individually about newspaper articles. As in the present case, the matter was not preserved for review. ***Id.*** This Court observed that "the trial court did question the jurors collectively about these newspaper articles and elicited a negative response." ***Id.*** The Court then held: "Since none of the jurors responded affirmatively, the trial court was not required to permit interrogation of the jurors individually." ***Id.*** ***See also State v. Vineyard***, 497 S.W.2d 821, 828 (Mo.App.Spr.Dist. 1973) (holding trial court not required to proceed sua sponte and question

jurors individually when they were questioned collectively and no one indicated that they had seen the newspaper articles).

Analogous cases can be found in the area of individual questioning in voir dire. For example, in ***State v. Beishline***, 920 S.W.2d 622 (Mo.App.W.D. 1996), the appellate court noted that it was within the trial court's discretion as to the nature and scope of questioning and that the defendant was not entitled to individual voir dire on the issue of publicity where the trial court had collectively asked the jury who had been exposed to pre-trial publicity and whether those who had been exposed had formed opinions as to the defendant's guilt. ***Id.*** at 625.

In sum, appellant's case is squarely on point with this Court's opinion in ***Howard***. The trial court was not required to *sua sponte* inquire of the jurors individually when collectively they indicated that none of them had seen the articles. Moreover, appellant cannot begin to show a manifest injustice or miscarriage of justice from the lack of such individual questioning when all of the jurors indicated that they had not seen the article in question. Appellant's claim is bereft of merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of June, 2004.

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IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

MICHAEL CRAWFORD,

Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Steven H. Goldman, Judge

RESPONDENT'S APPENDIX

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